Nos.
221
224

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

Nos. 221 and 224.

JOSEPH COSTELLO,
Petitioner,

v.

UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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ARGUMENT.

1. The government contends that resolution of the issue raised by the motion to suppress is not necessary for the disposition of the case because the gun "which formed the basis of count 2 was not the subject of a motion to suppress." Brief for the United States in opposition, p. 10. But

the motion to suppress sought to suppress all of the evidence seized from Costello's automobile on February 27, 1956, the date of his arrest; and "any evidence gained directly or indirectly as a result of such search and seizure" (R. 29). Moreover, counsel for the government agreed that the entire indictment in this case was the result of this arrest (R. 32).

Even if we assume that the gun involved under count 2 was not subject to suppression, the government's position is without merit. The government argues that petitioners received concurrent sentences and "count 2 alone will support the verdict." The issue is not whether the evidence was sufficient on one count but whether the error in admitting the gun found in Costello's automobile and testimony concerning Costello's possession of the gun into evidence influenced the jury in reaching its verdict. **Kotteakos v. United States,** 328 U. S. 750. The government further contends that even as to Counts 1 and 3 "the physical introduction of the gun in evidence was not the major part of the evidence of the crimes charged." Brief for the United States in opposition, p. 10. But this position ignores the rule that where illegally obtained evidence is involved an Appellate Court will not weigh its capacity to influence the jury. **Honig v. United States,** 8 Cir., 208 F. (2d) 916, 921. And in cases involving illegal confessions this Court also does not weigh the capacity of the confession to influence the jury. It should also be noted that, if the motion to suppress had been sustained, not only the physical evidence of the gun would have been excluded but all testimony concerning the gun. Furthermore, the gun found in Costello's automobile was a major factor in the verdict. The government is in error in saying that the testimony of Lewis showed the interstate transportation of the guns. His testimony was limited to the purchase of the guns and was vague as to the participation of Costello in the purchase. Lewis stated that Cannella ordered the guns

and left a number where he was to telephone, asking for Joe, and that he did telephone and ask for Joe (R. 109, 112). There was no testimony apart from the tainted evidence linking Costello to the transportation.

Moreover, Count 1 and Count 2 of the indictment charged the same offense. The charge in these counts is analogous to that of **Bell v. United States**, 349 U. S. 81, where a statute which forbade the transportation in interstate commerce of any woman for the purpose of prostitution was construed to mean that the transportation of two women on the same trip and in the same vehicle constituted a single offense. The instant statute makes it unlawful to transport any firearms and the evidence showed that the two guns were obtained and transported at the same time.

The government relies in part on **Rios v. United States**, 9 Cir., 256 F. (2d) 173, petition for certiorari pending, No. 40 Misc. There the District Court made an independent finding that the search was reasonable. In the instant case, however, neither the Court nor the government considered the search to be reasonable. This Court has never decided the question as to whether or not the "silver platter" doctrine is applicable when a State has a State exclusionary rule, or whether it is applicable after a State Court has found that the State officers have seized the evidence illegally. The issue involved is not whether the Federal Court should or should not discipline or correct State officers. The issue is whether or not the "silver platter" doctrine should be extended to frustrate the deterrent effect of the State exclusionary rule.

2. The issue raised by the motion for a severance is not whether the jury might have been confused, but whether a jury which had to determine which of two F. B. I. statements attributed to Cannella was credible could disregard Cannella's alleged fright in determining Costello's guilt

after determining the credibility of the statements themselves by considering his alleged fear of retaliation from Costello.

The government's argument that there was no error in instructing the jury that if and only if they found Costello guilty they should consider whether Cannella aided and abetted him is fallacious. It ignores the fact that the Court ostensibly admitted in evidence Cannella's confession against Cannella himself. If Cannella were tried alone, Cannella's confession might have tipped the scales and convinced a jury to convict him. If Costello were tried alone, with Cannella's confession absent, the jury might have decided to acquit him. It was possible in the instant case to find the guilt of the two defendants independently because more evidence was admissible against Cannella than against Costello. The government's position in this respect defeats its argument that there was no error in not granting a severance. If the guilt of Costello and Cannella were interrelated and Cannella's confession was only admissible against him that fact alone should have entitled Costello to a severance because it was impossible for the jury to consider the evidence solely as to Cannella. Cf. **Anderson v. United States**, 318 U. S. 350, 356-357.

3. The important difference between **United States v. Scully**, 2 Cir., 225 F. (2d) 113, 116, certiorari denied, 350 U. S. 897, and the instant case relative to the calling of Cannella before the Grand Jury is the fact that in Scully there was only a mere possibility that the witness might later be indicted. Here Cannella was considered as a prospective defendant prior to his second appearance. It is obvious that the only reason that he was called before the Grand Jury was to obtain admissions to be used against him at the trial. Such a practice should not be approved. A person may be fully cognizant of his rights

not to testify against himself and yet be willing to testify as a witness prior to becoming a de facto defendant. However, a de facto defendant would rarely submit himself to examination by a government attorney outside the presence of his own counsel. It seems to us that there is a certain amount of deceit practiced when a defendant is called before the Grand Jury and not advised of his status as a defendant.

CONCLUSION.

For the reasons set out above and those set out in the petitions the writ of certiorari should be granted.

Respectfully submitted,

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